94-2050 (3)

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1994

MICHAEL G. TYSON,

Petitioner,

v.

CLARENCE TRIGG, Superintendent of the Indiana Youth Center; and ATTORNEY GENERAL OF THE STATE OF INDIANA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petitioner's Reply Brief

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11 pp

TABLE OF CONTENTS

I. BOTH THE "NEW RULE" QUESTION AND THE SUBSTANTIVE JUDGE SELECTION ISSUE ARE WORTHY OF THIS COURT'S ATTENTION . . . 1

II. THIS CASE PRESENTS SEVERAL IMPORTANT QUESTIONS UNDER THE SIXTH AMENDMENT AND UNDER TAYLOR V. ILLINOIS 3

III. THIS IS AN APPROPRIATE CASE IN WHICH TO RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHICH HARMLESS ERROR TEST APPLIES ON HABEAS CORPUS REVIEW WHEN THE STATE COURTS HAVE CONDUCTED NO HARMLESS ERROR ANALYSIS 6

CONCLUSION 8

TABLE OF AUTHORITIES

Brecht v. Abrahamson,
507 U.S. __, 113 S.Ct. 1710,
123 L.Ed.2d 353 (1993) 6,7

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824,
17 L.Ed.2d 705 (1967) 6,7

Kotteakos v. United States,
328 U.S. 750, 66 S.Ct. 1239,
90 L.Ed. 1557 (1946) 6,7

Kyles v. Whitley,
__ U.S. __, 115 S.Ct. 1555,
131 L.Ed.2d 490 (1995) 6,7

O'Neal v. McAnnich,
__ U.S. __, 115 S.Ct. 992,
130 L.Ed.2d 947 (1995) 6

Taylor v. Illinois,
484 U.S. 400, 108 S.Ct. 646,
98 L.Ed.2d 798 (1988) 3, 4

PETITIONER'S REPLY BRIEF

I. BOTH THE "NEW RULE" QUESTION AND THE SUBSTANTIVE JUDGE SELECTION ISSUE ARE WORTHY OF THIS COURT'S ATTENTION

The State's arguments notwithstanding, this case presents an issue of obvious and utmost importance: whether the "new rule" doctrine insulates from habeas review -- and thus, for all practical purposes, from virtually all federal review -- the most obnoxious and egregious violations of due process simply because no judicial precedent explicitly condemns the practice being challenged. While both the Court of Appeals for the Seventh Circuit and the Respondents struggle to avoid embracing that stark and repugnant notion outright, a reading of the Seventh Circuit's decision demonstrates that it lies at the heart of that Court's "new rule" ruling. As argued in the Petition for a Writ of Certiorari, whether this Court should repudiate the notion that the absence of direct precedent on point places a claim outside the scope of review on habeas (and the language in this Court's precedents which give rise to that notion) is a question that is at the core of federal habeas jurisdiction and that is deserving of review under the Court's certiorari

jurisdiction.

The substantive question presented is equally important. The Respondents' papers obfuscate it but the question is the simple one of whether giving the prosecutor the power to pick the trial judge gives the State an unfair advantage which violates a criminal defendant's right to due process. The Court of Appeals for the Seventh Circuit correctly identified the issue, but rejected it based on a peculiar misunderstanding or misstatement of the facts.[1] The Respondents do not explicitly adopt the misstatement, yet they build upon it, claiming that prosecutors, both state and federal, routinely make decisions that affect which among several courts will hear a particular case.

This case, does not involve venue rules or case assignment systems in which prosecutors can indirectly influence or affect the selection of a trial judge. This case is about a system which unambiguously and directly gave the prosecutor the power to choose the Marion County Judge who would preside at Tyson's trial. While that particular system may have been

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[1] See n.6 of Petitioner's Petition for a Writ of Certiorari.

abandoned in Marion County, its abandonment does not militate against granting review in this case. The fact remains that Tyson's conviction resulted from this system. Moveover, there may be other jurisdictions in which prosecutors have a direct influence on the selection of trial judges. Review of this case -- where the prosecutor's exercise of power was direct and absolute -- is plainly appropriate and would represent a prudent investment of this Court's resources, not a squandering of them.

II. THIS CASE PRESENTS SEVERAL IMPORTANT QUESTIONS UNDER THE SIXTH AMENDMENT AND UNDER TAYLOR V. ILLINOIS

Petitioner seeks certiorari on the question whether the exclusion of three fact witnesses as a "sanction" for a "discovery violation" violated his rights under the Sixth Amendment, as interpreted by Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Petitioner has demonstrated that there exists a conflict in the Circuits as to whether or not witness preclusion is a permissible discovery sanction in the absence of a willful or bad faith discovery violation. Petitioner has also argued that the Sixth Amendment issue presented in this case is a

particularly compelling one for review because the discovery obligation Petitioner supposedly violated -- an obligation to disclose "potential" witnesses, not just witnesses he "intended" or "expected" to call -- itself arguably exceeded the bounds of constitutionally permissible discovery from a criminal defendant.

Remarkably, the Respondents, in their opposition papers, take the position that no conflict in the Circuit exists and simply assume that there was a valid discovery obligation and that the defendant breached it. More remarkably still, the Respondents in their argument do not even cite Taylor v. Illinois, let alone argue that it was correctly applied in this case. On the other hand, perhaps it is not so remarkable; though Petitioner relied throughout these proceedings on Taylor v. Illinois, neither the Indiana trial court, nor the Indiana Court of Appeals acknowledged the existence or relevance of Taylor or the Constitutional constraints it places on the use of defense witness preclusion as a discovery sanction in a criminal case.

No court but this one can declare Taylor a dead letter. And Petitioner submits that the time has come for this

Court to revisit Taylor and to consider the constellation of issues surrounding witness preclusion as a discovery sanction. To be sure, the witness preclusion issue arises in a specific and unique factual context: every discovery sanction question does. But the broad issues this case presents -- the role of willfulness and bad faith in imposing discovery sanctions; the scope of permissible discovery from a defendant in a criminal case; defense counsel's obligations to his client, to the court, and to the prosecution when new information is discovered after the trial has begun; and the appropriate assessment of "prejudice" to the State and to the defendant in connection with the admission, or exclusion, of evidence that emerges during the course of trial -- are important issues of Constitutional law. They are undeniably issues that arise with great frequency and upon which the lower courts, both state and federal, sorely need guidance.

III. THIS IS AN APPROPRIATE CASE IN WHICH TO RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHICH HARMLESS ERROR TEST APPLIES ON HABEAS CORPUS REVIEW WHEN THE STATE COURTS HAVE CONDUCTED NO HARMLESS ERROR ANALYSIS

The Respondents concede that the Circuits are in conflict regarding whether, on habeas corpus review, the Brecht[2] (Kotteakos[3]) or the Chapman[4] harmless error standard applies where the state courts have not recognized any Constitutional error, and thus have not undertaken any harmless error analysis at all. They state that the Eighth Circuit's ruling that the Chapman standard applies in such cases predates two recent decisions of this Court, O'Neal v. McAnnich, __ U.S. __, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), and Kyles v. Whitley, __ U.S. __, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), and so it does. But O'Neal does not

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[2] Brecht v. Abrahamson, 507 U.S. __, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

[3] Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

[4] Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

address the issue of which standard applies. And Kyles supports Petitioner's position that the Brecht standard does not necessarily govern. Kyles, which involved a Brady violation, cites Brecht for the proposition that "the standard of harmlessness generally to be applied in habeas cases is the Kotteakos formulation." 115 S. Ct. at 1567 (emphasis added).

The Respondents also argue that certiorari should not be granted in this case because the harmless error inquiry "may not even be outcome determinative." But, as Petitioner has already noted:

> [T]he single judge who did consider the witness exclusion under the Chapman harmless error test ... concluded that '[w]ithout question, [the] error was not harmless beyond a reasonable doubt.' (A-159)

The Respondent's arguments to the contrary notwithstanding, a clear conflict in the Circuits exists, and this is a perfect case in which to resolve it.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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